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**IN THE
COURT OF APPEALS OF INDIANA**

JEFFREY PEARSON,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 45A03-0610-CR-507
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Thomas P. Stefaniak, Jr., Judge
Cause No. 45G04-0211-FD-250

July 27, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant Jeffrey Pearson (“Pearson”) appeals the trial court’s restitution order following his guilty plea to Conversion, as a Class A misdemeanor.¹ We reverse and remand.

Issue²

Pearson raises the issue of whether the trial court erred in ordering restitution without determining his ability to pay.

Facts and Procedural History

Between January 1, 1997, and December 31, 2000, Pearson was a police officer with the East Chicago Police Department and served as the treasurer of the local Fraternal Order of Police (“FOP”) Lodge. After complaints from two widows who had not received payments from the FOP’s death benefit account, a trustee of the FOP began to investigate the lodge’s finances. The investigation uncovered that Pearson wrote checks to himself for unauthorized amounts from the FOP’s death benefit account. It was also discovered that when the death benefit account funds had been transferred to new accounts, the amounts withdrawn from the prior accounts compared to the amounts deposited in the new accounts differed by thousands of dollars.

After a grand jury indictment for Theft, as a Class D felony,³ on November 2, 2002, Pearson and the State filed a Stipulated Plea and Agreement on October 31, 2005. Pursuant

¹ Ind. Code § 35-43-4-3(a).

² Pearson mailed a letter to this Court, separate from his appellate materials, essentially contesting the amount of money he took from the Fraternal Order of Police. However, this issue was not raised in his brief on appeal. Accordingly, we do not address this issue.

to the plea agreement, Pearson would plead guilty to conversion, as a Class A misdemeanor, and make restitution to the FOP in an amount determined by the trial court. In exchange, the State would amend the charges to add the count of conversion, dismiss the theft charge, and agree that Pearson be sentenced to one year in the Lake County Jail that would be suspended to probation.

After the presentation of restitution evidence at the sentence hearing, the trial court sentenced Pearson according to the terms of the plea agreement, in part ordering Pearson to pay \$52,685.97 in restitution to the FOP. The trial court also asked Pearson if he intended to appeal his sentence and whether he would need an appellate public defender. Pearson responded affirmatively to both questions. The order issued on August 24, 2006, by the trial court read, in part:

MITIGATING CIRCUMSTANCE: The court considers the following factor as a mitigating circumstance or as favoring the sentence and imposing probation:

1. The defendant will make restitution to the Fraternal Order of Police, Lodge #59, pursuant to the terms of the written plea agreement, for damage of loss sustained in the amount of Fifty-Two Thousand Six Hundred Eighty-Five Dollars and Ninety-Seven Cents (\$52,685.97), as determined by the court upon evidence presented. The defendant is ordered to make restitution payments during his probationary term in a monthly amount to be determined by the probation department upon assessment of the defendant's financial status, but in an amount of not less than One Hundred Fifty Dollars (\$150.00) per month.

Appellant's Appendix at 76.

On September 26, 2006, the trial court entered an order, noting that the appeal was not addressed in its original order. The order appointed the Office of the Appellate Public

³ Ind. Code § 35-43-4-2.

Defender as counsel for Pearson and instructed counsel to file a notice of appeal on or before October 27, 2006. This appeal ensued.

Discussion and Decision

On appeal, Pearson contends that the trial court erred in ordering restitution as a condition of his probation without determining whether he had the ability to pay. We agree.

When a trial court orders a defendant to pay restitution to the victim as a condition of probation, Indiana Code Section 35-38-2-2.3(a)(5) requires a trial court to “fix the amount, which may not exceed an amount the person can or will be able to pay, and shall fix the manner of performance.” Thus, prior to setting the amount and manner, the trial court must determine the defendant’s ability to pay the amount of restitution. Walsman v. State, 855 N.E.2d 645, 654 (Ind. Ct. App. 2006), reh’g denied.

The trial court’s order noted a total restitution amount of \$52,685.97 and a monthly amount to be paid by Pearson during his probation. The monthly amount was to be determined by the probation department, but the minimum was set at \$150. However, the trial court did not make a finding as to Pearson’s ability to pay, conduct a hearing on his ability to pay, or request a presentence report to determine his financial status.

The State argues that the ordered restitution was not a condition of probation but rather was a term of the sentence imposed. Although the trial court’s order does not specifically state that the restitution is a condition of Pearson’s probation, it is clear that the order requires Pearson to make restitution payments during his probationary term and he would be subject to imprisonment if such payments were not made. Therefore, the order

made the payment of restitution a condition of Pearson's probation.

We conclude that the trial court erred when it failed to determine Pearson's ability to pay the ordered restitution. We therefore remand this cause to the trial court with instructions to hold a hearing, to make findings on Pearson's ability to pay the ordered restitution, and to set the manner of performance of such payment.

Reversed and remanded.

SHARPNACK, J., and MAY, J., concur.